Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

Vol. 24 OCTOBER 10, 1990 No. 41

This issue contains:

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

The decisions, rulings, notices and abstracts which are published in the CUSTOMS BULLETIN are subject to correction for typographical or other printing errors. Users may notify the U.S. Customs Service, Office of Logistics Management, Printing and Distribution Branch, Washington, D.C. 20229, of any such errors in order that corrections may be made before the bound volumes are published.

For sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402

U.S. Customs Service

Treasury Decision

(T.D. 90–77)

APPROVAL OF CHAMBERLAIN AND ASSOCIATES AS A COMMERCIAL GAUGER

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of approval of Chamberlain and Associates as a commercial gauger.

SUMMARY: Chamberlain and Associates of Deer Park, Texas recently applied to Customs for approval to gauge imported petroleum, petroleum products, organic chemicals and vegetable and animal oils under Part 151.13 of the Customs Regulations (19 CFR 151.13). Customs has determined that Chamberlain and Associates meets all of the requirements for approval as a commercial gauger.

Therefore, in accordance with Part 151.13(f) of the Customs Regulations, Chamberlain and Associates, 1417 Roosevelt, P. O. Box 752, Deer Park, Texas 77536 is approved to gauge the products named above in all Customs districts.

EFFECTIVE DATE: September 16, 1990.

FOR FURTHER INFORMATION CONTACT: Ira S. Reese, Special Assistant For Commercial and Tariff Affairs, Office of Laboratories and Scientific Services, U.S. Customs Service, 1301 Constitution Ave. NW, Washington, D.C. 20229 (202–566–2446).

Dated: September 19, 1990.

JOHN B. O'LOUGHLIN,
Director,
Office of Laboratories and Scientific Services.

[Published in the Federal Register, September 26, 1990 (55 FR 39346)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

James L. Watson
Gregory W. Carman
Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave

Senior Judges

Morgan Ford

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 90–91)

WESTERN CONFERENCE OF TEAMSTERS, PLAINTIFF *v.* WILLIAM E. BROCK, SECRETARY, U.S. DEPARTMENT OF LABOR, DEFENDANT

Court No. 86-04-00436

[Judgment for defendant.]

(Dated September 12, 1990)

James T. Grady, General Counsel, International Brotherhood of Teamsters, Of Counsel, (*A. E. Lawson*) for plaintiff.

Stuart M. Gerson, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Jane E. Meehan*); *Gary Bernstecker*, United States Department of Labor, Of Counsel, for defendant.

OPINION

CARMAN, *Judge*: In *Western Conference of Teamsters v. Brock*, 13 CIT ___, 709 F. Supp. 1159 (1989) (*Teamsters I*) this Court remanded this action to the United States Department of Labor (Labor) to conduct a new determination regarding the petition of the Western Conference of Teamsters (plaintiff) for certification of eligibility for trade adjustment assistance benefits. At the conclusion of the remand proceedings, Labor issued a new determination denying plaintiff's petition. 54 Fed. Reg. 22,824 (May 26, 1989) (Third Negative Determination). As further explained below, after examination of Labor's remand determination this Court concludes that Labor's denial of certification of eligibility for trade adjustment assistance was based upon substantial evidence on the record and was otherwise in accordance with law. Accordingly, the Court affirms the remand results and enters judgment for Labor dismissing this case.

BACKGROUND

The extensive procedural and factual background of this case is set out fully in *Teamsters I*, familiarity with which is presumed. For the purposes of clarity, the Court will recount certain background information.

In this action plaintiff represents former employees of the eight sugar processing plants and the headquarters of the Great Western Sugar Company (Great Western). Great Western processed sugar beets ob-

tained under contracts with sugar beet growers into refined sugar that it sold primarily to soft drink producers and food manufacturers. In March of 1985, Great Western, formerly one of the nation's leading processors of sugar beets, closed its plants and filed for bankruptcy. R. 1 at 148, 163.[1]

Plaintiff, on behalf of the former Great Western employees, subsequently filed a timely petition for certification of eligibility for trade adjustment assistance with Labor. Labor denied plaintiff's application, initially and after two separate remands from this Court, based upon its determination that imports of articles like or directly competitive with refined sugar produced by Great Western did not contribute importantly to the workers' separation from employment and to the total decline in Great Western's sales or production within the meaning of 19 U.S.C. 2272(3) (1982 & Supp. IV 1986). *See* 50 Fed. Reg. 42,788 (Oct. 22, 1985); 52 Fed. Reg. 8,120 (Mar. 16, 1987); 54 Fed. Reg. 22,824.

In *Teamsters I*, this Court reviewed Labor's second negative determination upon remand and again remanded this action to Labor to determine whether raw sugar was directly competitive with refined sugar within the meaning of the statute. The Court also ordered Labor to explain its basis for distinguishing a prior determination in which Labor granted eligibility for adjustment assistance benefits to workers at Great Western's Longmont, Colorado plant based in part upon an examination of sugar prices. See 42 Fed. Reg. 43, 154 (Aug. 26, 1977) . The Court ordered Labor in conducting its new determination to explain whether price and profitability were appropriate criteria for Labor to examine in deciding whether increased imports contributed importantly to the termination of production at Great Western's plants in this case. *See* 13 CIT at ____, 709 F. Supp. at 1170-71.

In due course Labor issued the Third Negative Determination, quoted at length below, reiterating its conclusion that increased imports did not contribute importantly to the workers' employment loss of Great Western's demise as a viable sugar processor. The determination stated in pertinent part as follows:

> The Department agrees that within the context of the definition of "like or directly competitive" as that term is used in the Trade Act, raw sugar may be considered like or directly competitive with refined sugar. However, the significance of this fact in the instant cases is tempered by the operation of the sugar price support program which effectively insulated raw sugar producers and through them processors, from injurious import competition.
>
> The price support program operated through quotas that limited raw sugar supply to achieve a target support price for sugar. The authority for setting the support price for sugar for the 1981–1985 crops was contained in the 1981 Agriculture and Food Act. The Market prices resulting from quotas were intended to yield prices sufficient to repay loans made to sugar processors by the Commodity

[1] Throughout this opinion references to the administrative record of the initial negative determination are cited as R. 1 at ___. References to the third supplemental administrative record are cited as R. 4 at ___.

Credit Corporation (CCC) and allow, but not guarantee, processors a profit. If price targets were not achieved, processors could forfeit the refined sugar as payment for the loans from the CCC.

As a participant and beneficiary in the price support program, Great Western was obligated to purchase domestically grown sugar beets at no less than a specified support level in order to borrow from the CCC. According to sugar experts in the Department of Agriculture, refined beet sugar market prices exceeded the loan rate for sugar beets in the period relevant to this investigation and Great Western should have been able to make a profit in excess of that which may have resulted from the target price level set by the program. Thus, petitioner's allegation that Great Western was unable to secure sugar beet acreage commitments because of low import prices is not supported by the facts.

The Department's denials in the instant cases were issued on October 7, 1985 when the domestic market was insulated from foreign competition. Sugar imports were restricted so as to increase sugar prices to the extent that processing companies sold sugar on the market rather than as payment for loans from the CCC. The average market price for refined beet sugar in the insulated Midwest market was 24.2 cents a pound in the last quarter 1 of 1984; the raw sugar price in New York was 21.7 cents a pound and the average world price for raw sugar in the same period was 5.2 cents a pound. Further, U.S. Department of Agriculture data show the penetration of [high fructose corn syrup (HFCS)] into the domestic sugar/HFCS market increasing from 1,046,000 tons in 1977 to 5,380,000 tons in 1985. The market penetration made by HFCS increased from 9.2 percent in 1977 to 41.5 percent in 1985. This fact is confirmed in the Department's survey of Great Western's customers which shows the large bottling companies greatly reducing their purchases of refined sugar from Great Western and shifting purchases to domestic HFCS.

The domestic sugar market applicable to the Longmont certification in 1977 differed substantially from that in which Great Western operated in the 1984/85 period. The Longmont certification was issued on August 16, 1977 when the domestic sugar market was for all practical purposes unregulated. When the Sugar Act[ ] expired on December 31, 1974, prices [sic] restrictions and quota levels were removed from sugar. As a result, domestic prices fell to the level of world sugar prices in response to the impact of an increased supply of sugar in a previously regulated market. World raw sugar prices dropped from 29.9 cents a pound average in 1974 to 8.1 cents a pound in 1977. Raw sugar prices in New York dropped from 29.5 cents a pound in 1974 to 11 cents a pound in 1977. In the unregulated market domestic refined sugar prices dropped from 32.1 cents a pound in 1974 to 15.1 cents a pound in 1977. It is clear that in the period applicable to the Longmont case world price levels were critical determinants of domestic prices and profitability. This was not true in the instant cases because quotas determined the level of domestic prices as evidenced by the great disparity between [the] world and domestic price level noted above. Also, HFCS had not ;as yet made the com-

petitive inroads on institutional users of sugar that are reflected in the instant situation on remand.

54 Fed. Reg. at 22,825.

DISCUSSION

A negative determination by the Secretary of Labor denying certification of eligibility for trade adjustment assistance will be upheld if it is supported by substantial evidence on the record and is otherwise in accordance with law. 19 U.S.C. § 2395(b) (1988); *see Woodrum v. Donovan*, 5 CIT 191, 193, 564 F. Supp. 826, 828 (1983), *aff'd, sub nom. Woodrum v. United States*, 2 Fed. Cir. (T) 82, 737 F.2d 1575 (1984). The findings of fact by the Secretary are conclusive if supported by substantial evidence. 19 U.S.C. § 2395(b). Substantial evidence has been held to be more than a "mere scintilla,n but sufficient evidence to reasonably support a conclusion. *Ceramica Regiomontana. S.A. v. United States*, 10 CIT 399, 405, 636 F. Supp. 961, 966 (1986) (and cases cited therein), *aff'd*, 5 Fed. Cir. (T) 77, 810 F.2d 1137 (1987).

Additionally, "the rulings made on the basis of those findings [must] be in accordance with the statute and not be arbitrary and capricious, and for this purpose the law requires a showing of reasoned analysis." *International Union v. Marshall*, 584 F.2d 390, 396 n.26 (D.C. Cir. 1978). "To qualify for benefits, the statute requires a causal nexus between increased import penetration and the workers'[ ] separation. A causal nexus exists where there is a 'direct and substantial relationship between increased imports and a decline in sales and production.'" *Former Employees of Health-Tex. Inc. v. United States Department of Labor*, 14 CIT ____, Slip Op. 90–80 at 2 (Aug. 27, 1990) (quoting *Estate of Finkel v. Donovan*, 9 CIT 374, 382, 614 F. Supp. 1245, 1251 (1985)) (other citations omitted).

Plaintiff argues that the evidence in the record is insufficient to support Labor's departure from its previous analysis in the Longmont certification, that Labor failed to consider rising imports of raw sugar in its determination and that it was error for Labor to disregard any economic factors prior to the initiation in 1981 of the sugar price support program.

Labor contends its determination is based upon substantial evidence and is otherwise in accordance with law.

The Court finds that plaintiff's arguments lack merit. In its Third Negative Determination and the associated administrative record, Labor detailed the manner in which the sugar price support system established by Congress insulated the domestic raw and refined sugar market from the effects of increased imports. In effect, the complex price support system insured, through various tariff and non-tariff barriers, that the domestic price of sugar remained at artificially inflated levels. *See* Confidential Administrative Record (Conf. R.) 4 at 2; 54 Fed. Reg. at 22,825; *and see Defendant's Memorandum in Response to Plaintiffs' Objections to the Remand Determination*, at 8-21.

The record also makes it clear that the analysis used in the Longmont certification has no bearing on this case because the price support system

was not in effect at that time. Indeed, it appears that the decision to eliminate sugar price supports and quotas in 1974 led to the collapse of the domestic sugar market that resulted in the Longmont certification. *See* 42 Fed. Reg. at 43,154-55. However, it is also apparent from the administrative record in this case that after Congress reinstituted the sugar price support mechanisms, the price of sugar rose to a level sufficient to allow Great Western to operate profitably during the period investigated. *See* Conf. R. 4 at 2; 54 Fed. Reg. at 22,825. Furthermore, there is ample evidence that Great Western's demise was caused, not by the effect of increased imports, but by management decisions and other factors not related to increased imports. *See e.g.*, Conf. R. 4 at 2-3.

CONCLUSION

Accordingly, the Court concludes that Labor's determination denying plaintiff's application for certification of eligibility for trade adjustment assistance pursuant to 19 U.S.C. § 2272(3), based upon its determination that increased imports did not contribute importantly to the workers' separation from employment, is based upon substantial evidence on the record and is otherwise in accordance with law. Plaintiff's motion for judgment upon the agency record is denied, Labor's negative determination is affirmed and this action is dismissed.

(Slip Op. 90–92)

UNITED STATES, PLAINTIFF *v.* DR. GEORGE REUL AND ST. PAUL FIRE AND MARINE INSURANCE CO., DEFENDANTS

Court No. 85-04-00562

Statute of limitaiton did not bar this action to recover liquidated damages on an entry bond because under the terms of the bond the cause of action did not accrue until 30 days after the government gave importer notice to redeliver. There being no question of material fact, the government's motion for summary judgement is granted. The surety has the right to indemnification from the principal for its payment of the principal's debt. The government is awarded prejudgement and postjudgement interest.

[Plaintiff's motion for summary judgement is granted; surety's motion for summary judgement is granted.]

(Decided September 12, 1990)

Stuart M. Gerson, Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice, (*Veronica A. Perry*), for plaintiff.

Nathan, Nathan & Newman Co. (*Martin R. Nathan*), for defendant Dr. George Reul.

Sandler & Travis (*Leonard L. Rosenberg* and *Edward M. Joffe*), for defendant St. Paul Fire & Marine Insurance Co.

DICARLO, *Judge*: The government brings this action under 28 U.S.C. § 1582(2) (1988) to recover liquidated damages for the breach of two Immediate Delivery and Consumption Entry Bonds. Defendant St. Paul Fire & Marine Insurance Co., the surety on the bonds, cross moves for summary judgement and for judgement on the pleadings against the im-

porter and principal Dr. George Reul. The government also seeks prejudgement and postjudgement interest.

St. Paul argues this action is barred by the six year statute of limitation, genuine questions of material fact make summary judgement inappropriate and the governemnt is not entitled to prejudgement interest. The Court finds the action is not time barred, there are no material issues of fact and prejudgement and postjudgement interest are appropriate. St. Paul also argues it is entitled to exoneration of Dr. Reul's debt or indemnification for any payments it makes to satisfy the debt. The Court grants the surety's motion for judgement on the pleadings against Dr. Reul.

BACKGROUND

Dr. Reul imported a 1974 Ferrari automobile on June 14, 1977 and a 1977 Ferrari automobile on November 7, 1978. Dr. Reul declared the automobiles were not in conformity with the applicable Environmental Protection Agency and Department of Transportation standards. The automobiles were conditionally released upon the posting of two Immediate Delivery and Consumption Entry Bonds. St. Paul is the surety on those bonds.

Under the regulations in effect at the time the merchandise was entered, Dr. Reul was required to bring the vehicles into conformity with EPA and DOT regulations within ninety days of their conditional release or such additional time thereafter as Customs granted. See 19 C.F.R. §§ 12.74(c), 12.80(c) (1977 and 1978). Paragraph four of the bond provides for damages for failure to redeliver the non-conforming vehicles:

> (4) And if in any case the above-bounden principal shall redeliver or cause to be redelivered to the order of the district director of customs, on demand by him, in accordance with the law and regulations in effect on the date of the release of said articles, any and all merchandise found not to comply with the law and regulations governing its admission into the commerce of the United States, * * * or, in default of redeliver *after a proper demand* on him, the above-bounden principal shall pay to the said district director such amounts as liquidated damages as may be demanded by him in accordance with the law and regulations, not exceeding the amount of his obligation, for any breach or breaches thereof;

(Emphasis added.)

On March 19 and 20, 1979, Customs sent Dr. Reul notices to redeliver the automobiles within 30 days. To date, the vehicles have not been redelivered. Asserting that Dr. Reul is in breach of the bonds, the government filed this action on April 17, 1985 to recover liquidated damages in the amount of $61,000.

In their answers, Dr. Reul and St. Paul raised numerous affirmative defenses. With the exception of those arguments considered below, those defenses were not argued in the briefs submitted on this motion and cross-motion. Those arguments having been submitted without the support of facts or legal analysis are deemed to have been abandoned. The

Court, therefore, does not pass on their merits. Except for an answer, Dr. Reul has not opposed either the government's action or the cross-motion.

DISCUSSION

I. *The Statute of Limitation:*

There is no dispute that a six year statute of limitation governs this action. *See* 28 U.S.C. § 2415(a) (1988). St. Paul argues that the cause of action accrued 90 days after entry of the merchandise because Custom's regulations required redelivery or proof of compliance with EPA and DOT regulations within 90 days of entry unless the District Director of Customs granted an extension. See 19 C.F.R. §§ 12.73, 12.80 (1977 and 1978). The government counters that under paragraph four of the bond, the statute of limitation began to run after the time for redelivery set forth in the demands elapsed. On March 19 and 20, 1979, Customs issued demand notices giving the importer 30 days to redeliver the vehicles.

The Court finds that under paragraph four of the bond the demand notices control the running of the statutory period. This finding is consistent with *United States v. Peerless Ins. Co.*, 12 CIT ____, 703 F. Supp. 955 (1988). In that case, the court considered a bond with identical language and held that the principal breached the bond on the failure to redeliver in accordance with a notice to redeliver. Here, Customs demanded redelivery on March 19 and 20, 1979. The importer breached the terms of the bond upon his failure to redeliver by April 18 and 19, 1979. The action is timely since the government filed it on April 17, 1985.

II. *Questions of Fact:*

Summary judgment is appropriate where there is no genuine issue of material fact. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585–86 (1986). To survive a motion for summary judgment, the opposing party must come forward with specific facts showing that there is a genuine issue for trial. *Id.* at 587. The non-movant may not rest on its conclusory pleadings but must set out what specific evidence could be offered at trial. *Sweats Fashions, Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 1562–63 (Fed. Cir. 1987).

St. Paul asserts that Dr. Reul will present evidence that one of the imported vehicles was destroyed and the other was brought into compliance. Neither defendant has submitted any evidence to substantiate this the claim that one of the automobiles was brought into compliance with EPA and DOT regulations. Nevertheless, according to St. Paul, this assertion creates issues of material fact precluding summary judgment. St. Paul's claim, without some specific facts indicating when or how the vehicle was brought into compliance, is insufficient to raise an issue of material fact. Furthermore, the Court notes this action is predicated on the importer's failure to redeliver the vehicles in compliance with the redelivery notices. The fact that the importer may have complied with EPA and DOT regulations does not eliminate a cause of action for liquidated damages based on the failure to redeliver in accordance with the terms of the bond.

Under Customs' regulation controlling the destruction of prohibited merchandise:

> Merchandise regularly entered or withdrawn for consumption in good faith and denied admission into the United States by any Government agency after its release from Customs custody, pursuant to a law or regulation in force on the date of entry or withdrawal for consumption, may be destroyed *under Government supervision*. In such case, the destroyed merchandise is exempt from duty and any duties collected thereon shall be refunded.

19 C.F.R. § 158.41 (1990) (emphasis added). There is no evidence indicating that the automobile was destroyed under government supervision. Assuming the vehicle was destroyed, defendants have offered no reason for the failure to destroy it under government supervision. St. Paul asserts that Dr. Reul will claim that the vehicle was sold for parts. Nevertheless, there is no evidence of this sale or whether it would qualify as the destruction of the automobile. St. Paul's claim, therefore, does not raise a genuine issue of material fact.

St. Paul has not come forward with specific facts showing that there is a genuine issue for trial. *See Zenith Radio*, 475 U.S. at 587. The Court finds it is not precluded from granting the government's motion for summary judgment on the basis of St. Paul's unsubstantiated claims.

III. *Postjudgment and Prejudgement Interest:*

The government is statutorily entitled to postjudgment interest. 28 U.S.C. § 1961 (1988); *see also United States v. Lun May Co.*, 12 CIT ___, 680 F. Supp. 1573, 1576 (1988); *United States v. Imperial Food Imports*, 11 CIT 254, 256, 660 F. Supp. 958, 961, *aff'd*, 6 Fed. Cir. (T) 37, 834 F.2d 1013 (1987).

The government is also seeking prejudgment interest from the date of the breach. The equitable powers of this court give it discretion to award prejudgment interest. *United States v. Imperial Food Imports*, 6 Fed. Cir. (T) 37, 41, 834 F.2d 1013,1016 (Fed. Cir. 1987). In this case, the breach of the bond was clear. Customs did not unreasonably delay issuing notices to redeliver or in bringing this action. Under these circumstances, the United States should be compensated for the lost use of the money to which it has been entitled since April 19 and 20, 1979. Prejudgment interest is appropriate to reimburse the government for what amounts to a loan to the defendants. *Id.*; *accord Wallace Berrie & Co. v. United States*, 12 CIT ___, Slip Op. 88–15, 9 (Feb. 9, 1988). Prejudgment interest is awarded to plaintiff from April 20, 1979 at the rate set forth in 26 U.S.C. § 6621 (1988). *Imperial Food Imports*, 11 CIT at 254, 660 F. Supp. at 961.

IV. *Discharge of Surety:*

A surety is discharged of its obligation to the principal when the principal's creditor imposes a new date for performance by the principal to the prejudice of the surety without the surety's consent. *See generally* 72 C.J.S. *Principal and Surety* §§ 128-149 (1987); J. Elder, Stearns' The Law of Suretyship § 6.16 (1972). St. Paul argues the government dis-

charged its obligations under the bond by extending the time in which Dr. Reul could bring the automobiles into compliance with EPA and DOT regulations.

This action is based upon the principal's failure to comply with a demand for redelivery within 30 days. The fact that Customs may have granted an extension of time in which to comply with EPA and DOT regulations does not affect St. Paul's obligations under the bond. Customs did not extend the time for performance beyond the period established in the bond.

St. Paul entered this agreement with full knowledge of paragraph four of the bond. St. Paul agreed to serve as a surety on a bond giving Customs some discretion to choose the time at which the principal becomes liable for liquidated damages. Consequently, there was no increased risk to St. Paul and it is not discharged of its obligations under the bond.

V. *St. Paul's Motion for Judgement on the Pleadings or Summary Judgement Against Dr. Reul:*

Pursuant to Rule 12(c) of the Rules of this Court, St. Paul moves for judgment on the pleadings or summary judgment in its cross-claim against Dr. Reul for exoneration or indemnification. Dr. Reul has not submitted an answer to the cross-claim and has also failed to submit any brief in opposition to this motion.

Absent an express agreement to the contrary, a contract of suretyship includes an implied contract that the principal will indemnify the surety for any payment made to the creditor under the suretyship agreement. *United States v. Griffin*, 707 F.2d 1477, 1481 (D.C. Cir. 1983); *United States v. Frisk*, 675 F.2d 1079,1082 n.6 (9th Cir. 1982). There being no genuine questions of material fact, St. Paul's motion for judgment on the pleadings for indemnification is granted.

Conclusion

This action to recover on an entry bond accrued on April 19 and 20, 1979, thirty days after the government gave the importer notice to redeliver the vehicles. As it was filed on April 17, 1985 this action is not barred by the six year statute of limitation. The Court finds there are no genuine issues of material fact and the government is entitled to payment of liquidated damages. There are also no genuine issues of material fact as to St. Paul's cross-motion for indemnification. The government's motion for summary judgment is granted and St. Paul's cross-motion for judgement on the pleadings is also granted.

St. Paul also seeks reimbursement for attorney's fees and expenses from Dr. Reul under the indemnification agreement. As the Court has no information regarding the amount of fees and expenses sought, it declines to rule on the motion. Pursuant to Rule 68 of the Rules of Court, St. Paul has 30 days in which to present an application for fees.

(Slip Op. 90–93)

AMERICAN CHAIN ASSOCIATION, PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND TSUBAKIMOTO CHAIN CO. AND U.S. TSUBAKI, INC., DEFENDANTS-INTERVENTOR

Court No. 89-02-00060

[Defendant's and Defendants'-Intervenor motions to dismiss are granted.]

(Decided September 17, 1990)

Covington & Burling (*David E. McGiffert* and *David R. Grace*) for the plaintiff.

Stuart M. Gerson, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Velta A. Melnbrencis*), *Pamela Green*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, Of Counsel, for the defendant.

Barnes, Richardson & Colburn, (*Robert E. Burke*, *Donald J. Unger* and *Kazumune V. Kano*) for defendants-intervenor.

MEMORANDUM OPINION

CARMAN, *Judge*: Defendant United States Department of Commerce (Commerce) and intervenors Tsubakimoto Chain Company and U.S. Tsubaki, Inc. (collectively referred to as Tsubakimoto) move pursuant to Rules 1, 6, 7, and 12 of this Court to dismiss this case as moot. Plaintiff American Chain Association (plaintiff) opposes the motion. The complaint in this action contests Commerce's final results of the 1986-1987 administrative review of the roller chain antidumping duty finding with respect to Tsubakimoto. *See Roller Chain, Other Than Bicycle, From Japan; Final Results of AntidumPing Duty Administrative Review and Intent To Revoke In Part*, 54 Fed. Reg. 3,099 (Jan. 23, 1989); *See* Tariff Act of 1930, as amended, § 751, 19 U.S.C. § 1675 (1988) (section 751); 19 U.S.C. §§ 1516a(a)(2)(A)(i), 1516a(a)(2)(B)(iii) (1988); 28 U.S.C. § 1581(c) (1988).

BACKGROUND

On February 4, 1988, the Court issued a consent order requiring Commerce to conduct an administrative review of Tsubakimoto's roller chain entered during the period April 1, 1986 through March 31, 1987. *UST, Inc. v. United States*, Court No. 86–08–00993.[1] On January 23, 1989, Commerce published the final results of the administrative review for this period. *See Roller Chain, Other Than Bicycle, From Japan*, 54 Fed. Reg. 3,099. Commerce determined that a weighted-average dumping margin of 0.47 percent *ad valorem* existed for Tsubakimoto during the period reviewed. As a result of this *de minimis* margin, Commerce announced that it would not require a cash deposit for estimated antidumping duties for future entries. Id. at 3,101. Commerce further announced

[1] This order also provided that if the review for the 1986-1987 period disclosed no antidumping margins, Commerce would not determine whether to finally revoke the antidumping duty order as to Tsubakimoto (T.D. 73-100) until the Court had decided, following briefing by the parties, whether or not a review was required for the period April 1, 1985 through March 31, 1986.

its intention[2] to partially revoke the antidumping finding on Tsubakimoto's chain, after determining that there was no likelihood of resumption of sales at less than fair value. *Id.* Plaintiff challenges these results in this action.

On August 14, 1989, Commerce published a notice of partial revocation of the antidumping finding on roller chain. *See Roller Chain, Other Than Bicycle, From Japan; Revocation In Part of Antidumping Finding*, 54 Fed. Reg. 33,259 (Aug. 14, 1989). In the notice, Commerce stated that the "partial revocation applied to all unliquidated entries [of] this merchandise manufactured and exported by Tsubakimoto and entered, or withdrawn from warehouse, for consumption on or after September 1, 1983." *Id.* at 33,260.[3]

Plaintiff instituted Court No. 89–09–00513, contesting the revocation determination and moved for a preliminary injunction, but did so after the statutory filing period had expired. On December 28, 1989, this Court granted Commerce's motion to dismiss plaintiff's challenge to the revocation determination based upon lack of jurisdiction for failure to commence a timely action. *See American Chain Ass'n v. United States*, 13 CIT ____, Slip. Op. 89-179 (Dec. 28, 1989).

CONTENTIONS OF THE PARTIES

Commerce maintains that plaintiff's failure to file a timely challenge to the revocation of the underlying antidumping duty order as to Tsubakimoto, published August 14, 1989, has made the pending challenge to Commerce's administrative review for the period 1986-1987 moot because Commerce's revocation determination is now final and binding on the Court. In other words, Commerce contends any decision rendered by this Court in this action concerning the section 751 review would only be advisory and therefore violative of Article III of the U.S. Constitution since there is no outstanding antidumping duty order. Tsubakimoto advances similar arguments to this effect.

Plaintiff asserts that this Court's dismissal of its challenge to Commerce's revocation of the antidumping duty order as to Tsubakimoto (due to the untimely filing of the summons) in no way mooted its pending challenge to the final results of Commerce's administrative review of entries of roller chain for the period 1986-1987.

Plaintiff contends, citing 19 C.F.R. § 353.54(e) (1988)[4], that based on Tsubakimoto's written assurances agreeing "to an immediate suspen-

---

[2]Commerce's determination was tentative because of this Court's outstanding order in Court No. 86-08-00993 not to revoke its antidumping duty finding with respect to Tsubakimoto without further briefing before the Court. *See* 54 Fed. Reg. at 3,100.

[3]Commerce also noted that Court No. 86-08-00993 (wherein the Court ordered Commerce not to revoke the antidumping duty order until the Court could further review the matter) had been dismissed on May 15, 1989. *See* 54 Fed. Reg. at 33,260.

[4]The regulation provides, in part, that before revocation:

> the parties who are subject to the revocation * * * must agree in writing to an immediate suspension of liquidation and reinstatement of the Finding or Order or continuation of the investigation, as appropriate, if circumstances develop which indicate that the merchandise thereafter imported into the United States is being sold at less than fair value.

19 C.F.R. § 353.54(e) (1988).

sion of liquidation and reinstatement of the [dumping] Finding * * *" if future sales of roller chain were made at less than fair value,[5] and Commerce's express reliance on this reinstatement agreement in reaching its tentative revocation determination, have operated to maintain its present challenge to the 1986-1987 administrative review as a live controversy. This is so, plaintiff argues, because if it were to prevail on the calculation counts in its complaint thus rendering the dumping margins more than *de minimis*, Commerce would be required to reinstate the antidumping duty finding as to Tsubakimoto and assess antidumping duties upon Tsubakimoto's 1986-1987 roller chain entries in accordance with those revised calculations.

DISCUSSION

The Court now turns to an examination of the applicable law. The jurisdiction of a court established pursuant to Article III of the U.S. Constitution is limited to the adjudication of live cases and controversies between the parties before it. *See* U.S. Const. art. III, § 2, cl. 1; *Burke v. Barnes*, 479 U.S. 361, 363 (1987).

This Court may only entertain a suit that involves "a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 241 (1937). In those circumstances where a pending action is made moot by later events, this Court must dismiss the pending action for lack of jurisdiction. *See e.g., Asahi Chemical Industry Co., Ltd. v. United States*, 13 CIT ___, 727 F. Supp. 625 (1989)[6]; *American Spring Wire Corp. v. United States*, 6 CIT 122, 124, 569 F. Supp. 73, 74–75 (1983).

Once Commerce has published its final determination to revoke an antidumping duty order, aggrieved parties may challenge Commerce's revocation order within the statutory time limits. *See* 19 U.S.C. § 1516a(a). If such an action is properly and timely commenced, the challenging litigant(s) can contest the "factual findings or legal conclusions upon which [Commerce's] determination is based." *Id.*

A revocation determination becomes final when a litigant misses the statutory deadline for challenging that determination, as did plaintiff here. *See American Chain Ass'n. v. United States*, 13 CIT ___, Slip. Op. 89-179. It follows that once a revocation determination is final, outstanding challenges to section 751 administrative reviews of the antidumping duty order, covering time periods after the effective date of the final revocation determination, are necessarily moot. In other words, the resolution of these pending challenges can have no force since there is no underlying antidumping duty order outstanding. Thus, the only relief

---

[5] *See Roller Chain, Other Than Bicycle, From Japan; Preliminary Results of Administrative Review of Antidumping Finding and Tentative Determination To Revoke In Part*, 48 Fed. Reg. 39,673, 39,674 (Sept. 1, 1983).

[6] In *Asahi*, the court found that Commerce's revocation of an antidumping duty order mooted challenges to the underlying less than fair value and injury determinations. 13 CIT ___, 727 F. Supp. 625.

the court could provide would be advisory and therefore violative of the Constitution.

Plaintiff here challenges Commerce's finding of a *de minimis* dumping margin for the 1986-1987 administrative review period. Based upon plaintiff's briefs, it appears that it is attempting to use its challenge to the 1986-1987 review period, as a way of revisiting Commerce's final revocation of the dumping order. In short, plaintiff wants this court to treat the 1986-1987 review challenge as a live controversy, speculating that its outcome would nullify Commerce's revocation determination. Unfortunately for plaintiff, however, this argument is unavailing because this Court was divested of jurisdiction to address the merits of the challenge to the 1986-1987 administrative review period when the underlying antidumping duty determination was revoked without timely challenge. Consequently, plaintiff's challenge to the 1986–1987 administrative review concerning the period after the September 1, 1983 effective date of the partial revocation, must be dismissed as moot.

Even assuming, *arguendo*, that Commerce's revocation determination was based directly upon an administrative review wrongly arrived at, the time to contest that revocation determination has expired. The Court cannot now properly reach the merits of plaintiff's argument that the 1986-1987 calculations were flawed. Congress has established the statutory scheme for judicial review of a revocation determination, and this Court may not expand it by allowing a litigant to contest that determination in the context of an administrative review challenge, the outcome of which can have no practical effect. In this regard, absent an antidumping duty order, no antidumping duties can be assessed with regard to Tsubakimoto's roller chain entries. The statutory scheme dictates that the existence of an unrevoked antidumping duty order is a necessary predicate to judicial review of section 751 administrative review determinations.

CONCLUSION

On the basis of the foregoing, the government's motion to dismiss this action as moot is granted, and the action dismissed.

(Slip Op. 90–94)

UNITED STATES, PLAINTIFF *v.* TERRY L. BEALEY AND INSURANCE COMPANY OF NORTH AMERICA, DEFENDANTS

Court No. 86-03-00348

Defendant's assertions of fraud by individuals not party to import transaction are insufficient to raise genuine issues of material fact as to liability for breach of a bond. Summary judgment is granted. The government is entitled to prejudgment and postjudgment interest.

[Plaintiff's motion for summary judgment granted; cross claimant's motion for summary judgment granted; action dismissed.]

(Decided September 17, 1990)

Stuart M. Gerson, Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice, (*Michael P. Maxwell*), for plaintiff.

Woolsey, Angelo & Thatcher (*Joseph Angelo*), for defendant Terry L. Bealey.

Stein, Shostak, Shostak & O'Hara (*Robert Glenn White*), for defendant Insurance Company of North America.

DiCARLO, *Judge*: The government moves for summary judgment for liquidated damages plus prejudgment and postjudgment interest for breach of an immediate delivery and consumption entry bond. Defendant Terry L. Bealey, the principal, opposes the motion arguing there are material issues of fact. Bealey and the Insurance Company of North America (ICNA), the surety, also oppose the government's request for an award of prejudgment interest. ICNA cross moves for summary judgment against Bealey for indemnification and attorneys' fees and expenses.

The Court has jurisdiction under 28 U.S.C. §§ 1582(2) and 1583 (1988). As there are no genuine issues of material fact and an award of prejudgment and postjudgment interest is appropriate, the government's motion for summary judgment is granted. ICNA's cross-motion for summary judgment for indemnification is also granted.

BACKGROUND

On October 12, 1978, Bealey as principal and ICNA as surety executed an immediate delivery and consumption entry bond. The bond is in the amount of $50,000 and covers multiple entries of certain articles at the Port of Los Angeles/Long Beach between October 5, 1978 and October 4, 1979. Under the bond, Bealey and ICNA jointly and severally agreed that Bealey would deliver to Customs all documents required by law or regulation for the entry of merchandise into the United States. The bond also provides that Bealey and ICNA are jointly and severally liable for liquidated damages if merchandise imported under the bond is not timely exported or redelivered to Customs' custody following a proper demand.

On November 27, 1978, Bealey signed consumption entry number 79-414618 as importer of record for the Lancia and posted his bond with Customs. As a condition of delivery and release of the Lancia, Bealey executed forms stating that within 90 days and 180 days respectively, he would provide Customs written releases from the Environmental Protection Agency and the Department of Transportation showing that the vehicle was exempt from U.S. emissions and safety standards or had been brought into compliance with them. If the releases were not obtained, the bond required either export or redelivery of the vehicle to Customs. Bealey does not deny signing the entry document, but asserts that because he was fraudulently induced to sign it, he was under no duty to obtain EPA and DOT releases or to redeliver the vehicle.

On April 9, 1980 when Bealey did not provide the releases, Customs issued a demand to redeliver the vehicle. Bealey did not redeliver or export the vehicle. On October 9, 1980, Customs demanded Bealey pay liquidated damages of $12,360, equal to the entered value of the vehicle and

its estimated duties. Customs sent a copy of the demand to ICNA. Neither Bealey nor ICNA protested this demand and the liquidated damages remain unpaid. The government commenced this action on March 18, 1986.

Bealey concedes he is the principal on the bond, but claims that he did not intend that it be used for importation of the Lancia. He alleges he was fraudulently induced by third parties to act as importer of record and post his bond for entry of the vehicle. Bealey contends he was merely the shipper who delivered the vehicle to the actual importer.

DISCUSSION

I. Government's Claim on the Bond:

A. *Questions of Fact:*

Summary judgment is appropriate where there is no genuine issue of material fact. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-86 (1986). To survive a motion for summary judgment, the nonmoving party must come forward with specific facts showing a genuine issue for trial. *Id.* at 587.

Bealey contends there are four issues of material fact precluding summary judgment: (1) whether Bealey was the actual importer, (2) whether third parties fraudulently induced Bealey to sign the entry document, (3) whether he intended to use his bond for entry of the Lancia, and (4) whether his bond covered importation of the Lancia.

Bealey's first three arguments all turn his assertion that he was fraudulently induced by third parties and the customshouse broker to act as importer of record and post his bond. Nevertheless, Bealey signed the consumption entry form which identifies him as the importer of record. The back of the entry form also states:

> To the best of my knowledge all statements appearing in the entry and in this invoice and all documents presented herewith in accordance with which this entry is made are true and correct in every respect.

Memorandum in Support of Plaintiff's Motion for Summary Judgment, Ex. C.

Bealey cites *Horwitz v. Sprague*, 440 F. Supp. 1346 (S.D.N.Y. 1977) for the proposition that any contract can be set aside for fraud. In *Horwitz*, the alleged fraud was perpetrated by a party to the contract. Here, the persons Bealey claims fraudulently induced him to sign the entry document were not parties to the bond nor were they listed on the entry form. Where fraud is committed by someone not party to a contract, a contract is voidable only under certain circumstances:

> If a party's manifestation of assent is induced by either a fraudulent or a material misrepresentation by one who is not a party to the transaction upon which the recipient is justified in relying, the contract is voidable by the recipient, unless the other party to the transaction in good faith and without reason to know of the

misrepresentation either gives value or relies materially on the transaction.

Restatement (Second) of Contracts § 164(2) (1979); *accord Morgan Guar. Trust Co. v. Republic of Palau*, 693 F. Supp. 1479, 1496-97 (S.D.N.Y. 1988); *Arlington Park Racetrack, Ltd. v. SRM Computers Inc.*, 674 F. Supp. 986, 993 (E.D.N.Y. 1987); *see also Taxin v. Food Fair Stores, Inc.*, 287 F.2d 448, 450 (3d Cir.) (citing Restatement of Contracts § 447, in discussion of fraud by third parties), *cert. denied*, 366 U.S. 930 (1961); *Blum v. William Goldman Theatres, Inc.*, 164 F.2d 192, 196 n.8 (3d Cir. 1947); 12 Williston on Contracts § 1518 (3d ed. 1970).

Bealey does not contend the government, ICNA, or their agents participated in, knew, or should have known of the alleged fraud. The government manifested material reliance by releasing the Lancia on condition of Bealey posting his bond. Thus, even if Bealey had been fraudulently induced by third parties to enter into this transaction and to post his bond, he will not be able to avoid his obligations as importer of record or as principal on the bond. Therefore, the issue of fraud does not present a genuine question of material fact.

Bealey's remaining assertion is that his bond does not cover importation of the Lancia because his bond number does not appear on the entry document. Bealey does not explain why his claim constitutes a material issue of fact. Bealey is the principal on a term bond covering multiple entries of unspecified articles at the Port of Los Angeles/Long Beach during the period in which the Lancia was entered. The Court finds that Bealey's assertion does not raise a genuine issue for trial.

Since Bealey has not shown a genuine issue for trial, the government's motion for summary judgment on its claim for liquidated damages in the amount of $12,360 is granted.

B. *Interest:*

The government's motion for summary judgment includes a request for prejudgment and postjudgment interest. As there is no statutory provision authorizing an award of prejudgment interest in an action by the government under 19 U.S.C. § 1582(2) (1988), the decision to make such an award lies within the discretion of the Court as part of its equitable powers. *United States v. Imperial Food Imports*, 6 Fed. Cir. (T) 37, 41, 834 F.2d 1013, 1016 (1987).

ICNA argues prejudgment interest is inappropriate because the government's action for liquidated damages is a claim for punitive civil fines not in compensation for lost income or use of monies. In *Imperial Food*, the Federal Circuit held reasonable liquidated damages resulting from breach of the terms of an import bond and failure to heed notices of redelivery are not penalties. Id. at 40. 834 F.2d at 1016. Here, the amount of liquidated damages the government claims is reasonable because it is based on the entered value of the Lancia and its estimated duties. *See id.*; *see also United States v. Lun May Co.*, 12 CIT ___, 680 F. Supp. 1573, 1576 (1988). Not allowing interest would amount to an interest-free loan to defendants. The government should be compensated for the lost use of

these funds. *Imperial Food*, 6 CIT at 41, 834 F.2d at 1016; *Wallace Berrie & Co. v. United States*, 12 CIT ____, Slip Op. 88–15 at 9 (Feb. 9, 1988); *United States v. Goodman*, 6 CIT 132, 140, 572 F. Supp. 1284, 1289 (1983).

ICNA argues the government failed to mitigate any injury occasioned by the breach of the bond through prompt prosecution of its claim. While there was an interval of nearly five and one-half years between Customs' notice of liquidated damages and the filing of this action, there is no evidence that the government's delay was prompted by any dilatory motive. The breach of the bond by the defendants was clear and the defendants knew the government could institute an action at any time within the six year limitation period. *See* 28 U.S.C. § 2415(a). To limit the recovery of prejudgment interest solely because the government did not commence an action shortly after it accrued could encourage Customs to file suit in actions that may have been resolved without resort to judicial intervention.

Under the facts of this case, the Court in its discretion awards prejudgment interest to plaintiff from April 16, 1980 at the rate set forth in 26 U.S.C. § 6621 (1988). *United States v. Reul*, 14 CIT ____, Slip Op. 90–92 at 7 (Sept. 12, 1990). The Court also awards postjudgment interest as the rate provided for in subsection (c) of 28 U.S.C. § 1961 (1988).

II. *ICNA'S Claim for Indemnification:*

Bealey does not oppose ICNA's motion for summary judgment in its cross-claim. He is the principal on the bond and signed the indemnification agreement. Since the government's motion for summary judgment is granted, and no other facts are in dispute, ICNA's motion for summary judgment is granted.

Conclusion

The government's motion for summary judgment, including prejudgment and postjudgment interest, is granted. ICNA's cross-motion for summary judgment against Bealey is also granted.

ICNA seeks reimbursement for attorney's fees and expenses from Bealey under the indemnification agreement. As this Court has no information required by Rule 68 of the Rules of this Court, it will not rule on that issue. Rule 68 requires an applicant to provide: 1) a citation to authority that authorizes an award; 2) a statement indicating how prerequisites to an award have been fulfilled; and 3) a sworn statement detailing the nature of the services rendered, the amount of time expended on each type of service, and the customary charge for each type of service. ICNA has 30 days in which to present an application for fees.

ANNOUNCEMENT

Chief Judge Edward D. Re has announced the call of the Seventh Annual Judicial Conference of the United States Court of International Trade. The Conference is scheduled for Monday, October 15, 1990, in The Ballroom at Windows on the World, 106th Floor, One World Trade Center, New York, New York and will commence at 9:15 a.m.

The theme of the Conference is: "The United States Court of International Trade in a World in Transition."

The Honorable Frank J. Guarini will present the Honorable Sam M. Gibbons, Chairman, Subcommittee on Trade, Committee on Ways and Means, United States House of Representatives, with the Court's Distinguished Service Award for his outstanding contributions to the administration of justice in the field of international trade law.

The Honorable Helen W. Nies, Chief Judge, United States Court of Appeals for the Federal Circuit, will be a special guest at the Conference.

The Conference will be attended by the Judges of the United States Court of International Trade, officials from the International Trade Commission, the Customs Service, the Departments of Justice, Commerce, and Treasury; members of the Bar of the Court; and other distinguished guests.

More than 350 lawyers, the largest single gathering in the United States of attorneys interested in the field of customs and international trade law, have participated in each of the past five Annual Judicial Conferences.

All interested persons are invited to attend. For further information, please write to:

USCIT Judicial Conference
c/o Office of the Clerk
United States Court of International Trade
One Federal Plaza
New York, New York 10007

Dated: August 31, 1990.

JOSEPH E. LOMBARDI,
Clerk of the Court.

Index

Customs Bulletin and Decisions
Vol. 24, No. 41, October 10, 1990

U.S. Customs Service

Treasury Decision

U.S. Court of International Trade

Slip Opinions

Notice

U.S. G.P.O. 1990-261-994:20004